Supreme Court, U
FILED
JAN 11 201
OFFICE OF THE CL

Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, *et al.*, *Petitioners*,

v.

SYLVIA BURWELL, *et al.*, *Respondents*.

PRIESTS FOR LIFE, *et al.*, *Petitioners*,

v.

DEPT. OF HEALTH & HUMAN SERVICES, *et al.*, *Respondents*.

(Additional Captions Listed on Inside Cover)

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

BRIEF OF *AMICUS CURIAE* ETHICS AND PUBLIC POLICY CENTER IN SUPPORT OF PETITIONERS

DANIEL P. COLLINS
Counsel of Record
ZACHARY BRIERS
ANKUR MANDHANIA
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071-1560
(213) 683-9100
daniel.collins@mto.com

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,
Petitioners,

v.

SYLVIA BURWELL, *et al.*, *Respondents*.

EAST TEXAS BAPTIST UNIV., *et al.*, *Petitioners*,

v.

SYLVIA BURWELL, *et al.*, *Respondents*.

LITTLE SISTERS OF THE POOR HOME FOR THE AGED,
DENVER, COLORADO, *et al.*, *Petitioners*,

v.

SYLVIA BURWELL, *et al.*, *Respondents*.

SOUTHERN NAZARENE UNIV., *et al.*, *Petitioners*,

v.

SYLVIA BURWELL, *et al.*, *Respondents*.

GENEVA COLLEGE, *Petitioner*,

v.

SYLVIA BURWELL, *et al.*, *Respondents*

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 7

I. The D.C. Circuit Applied the Wrong Standards in Holding That the Challenged Regulations Furthered a Compelling Governmental Interest 9

A. Consistent With Familiar Strict-Scrutiny Principles, RFRA Imposes Stringent Requirements for Determining Whether a Regulation Advances a Compelling Interest 10

B. The D.C. Circuit Failed to Apply These Stringent Standards 14

1. The D.C. Circuit Relied on a Bootstrap Approach That Improperly Defined the Compelling Interest as the Regulation Itself 14

2. The Other Interests Asserted by the Government Fail to Satisfy RFRA's Standards 18

II. The Government's "Accommodation" Is Not the Least Restrictive Means 22

A. Alternative One: Exempting Petitioners From the Contraceptive Mandate 23

B. Alternative Two: Subsidizing Contraceptive Coverage on the Exchanges 26

C. Alternative Three: Government Reimbursement for Contraception 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Ashcroft v. ACLU,
542 U.S. 656 (2004) 25, 29

Bernal v. Fainter,
467 U.S. 216 (1984) 27

Brown v. Entertainment Merchants Ass'n,
131 S. Ct. 2729 (2011) 6, 25, 27

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) .....*passim*

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 4, 12, 15, 16, 19

City of Boerne v. Flores,
521 U.S. 507 (1997) 17, 20, 22

Employment Div., Dep't of Human Res. of Oregon v. Smith,
494 U.S. 872 (1990) 4, 16, 22

Gonzales v. O Centro Espírita Beneficente União do Vegetal,
546 U.S. 418, 433 (2006). .....*passim*

Jacobson v. Massachusetts,
197 U.S. 11 (1905) 19

CASES—

Jehovah's Witnesses v. King County Hosp. Unit No. 1, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) 19

McCullen v. Coakley, 134 S. Ct. 2518 (2014) 24

McCutcheon v. FEC, 134 S. Ct. 1434 (2014) 3, 15

McDermott Int'l, Inc. v. Wilander, 498 U.S. 337 (1991) 10

Morissette v. United States, 342 U.S. 246 (1952) 10

NAACP v. Button, 371 U.S. 415 (1963) 10

Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927 (8th Cir. 2015) 23, 26, 28

Sherbert v. Verner 374 U.S. 398 (1963) 2, 10, 11

Thomas v. Collins, 323 U.S. 516 (1945) 11

Wisconsin v. Yoder 406 U.S. 205 (1972) 2, 10, 11

STATUTES

42 U.S.C. § 2000bb(a) 30

42 U.S.C. § 2000bb(b) 10

42 U.S.C. § 2000bb-1(a) 12

42 U.S.C. § 2000bb-1(b) ..... *passim*

42 U.S.C. § 2000bb-2(3) 8, 24

REGULATIONS

26 C.F.R. § 54.9815-2713A 7, 27

45 C.F.R. § 147.131(a) 21

Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870 (July 2, 2013)..... 21, 24, 26

Final Rules for Grandfathered Plans, etc., 80 Fed. Reg. 72192 (Nov. 18, 2015)..... 20

Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services, etc., 77 Fed. Reg. 8725 (Feb. 15, 2012)..... 24

INTEREST OF THE *AMICUS CURIAE*[1]

The Ethics and Public Policy Center ("EPPC") is a nonprofit research institution dedicated to defending American ideals and to applying the Judeo-Christian moral tradition to critical issues of public policy. A strong commitment to a robust understanding of religious liberty pervades EPPC's work. For example: EPPC's Faith Angle Forum aims to strengthen reporting and commentary on how religious believers, religious convictions, and religiously grounded moral arguments affect American politics and public life. EPPC scholars, such as EPPC Distinguished Senior Fellow George Weigel, write prolifically in defense of religious freedom. EPPC scholars have extensively criticized the HHS mandate for its intrusions on religious liberty. EPPC previously filed an *amicus curiae* brief addressing the proper interpretation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"), in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

SUMMARY OF ARGUMENT

In holding that the challenged regulations here were the least restrictive means of furthering a compelling governmental interest, the D.C. Circuit employed overly lenient and legally erroneous standards for applying RFRA's strict-scrutiny test. The

---

[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties in all seven cases have filed letters with the Clerk of the Court providing blanket consent to the filing of *amicus curiae* briefs.

D.C. Circuit's approach, if upheld here, would establish a dangerous precedent that would be applicable in all strict-scrutiny cases, thereby seriously threatening all constitutional rights.

1. In articulating the relevant "compelling governmental interest," the D.C. Circuit rested on a legally flawed approach that erroneously defined the asserted compelling interest in terms of the particular regulatory features selected by the Government. This bootstrap approach to strict scrutiny is contrary to precedent and common sense.

a. The first element of RFRA's strict-scrutiny test requires the Government to "demonstrate[] that application of the burden [on religious exercise] to the person ... is in furtherance of a compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(1). This element, in turn, imposes a two-part burden on the Government.

First, the Government must identify a governmental interest that is "compelling." Only "'paramount interests'" that protect against "'the gravest abuses'" may be deemed to be "compelling." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (citation omitted); *see also Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("interests of the highest order"). Put another way, only those interests that are so weighty that they would justify the derogation of constitutional rights are "compelling." Moreover, this Court has repeatedly held that "a law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 433 (2006) (citations and internal quotation marks omitted).

Second, once a properly defined compelling interest has been shown, RFRA requires the Government to prove that the application of the burden to "'the *particular* claimant whose sincere exercise of religion is being substantially burdened'" is in furtherance of that compelling interest. *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *O Centro*, 546 U.S. at 430-31) (emphasis added). Thus, the Government must demonstrate that "'granting specific exemptions to [these] particular religious claimants'" would likely produce the actual "harm" that the Government has a compelling interest in preventing. *Id.* (citation omitted).

b. Under these standards, the D.C. Circuit erred in holding that the Government has a compelling interest in "provid[ing] *seamless* coverage of contraceptive services for women," *i.e.*, "provid[ing] cost-free contraceptive coverage" in a manner that "remove[s] administrative and logistical obstacles to accessing contraceptive care." Pet. App., No. 14-1505, at 56a (emphasis added).

The asserted interest in "seamless coverage" is improperly framed in the granular terms of the Government's chosen *means* of accomplishing its ultimate *objectives* of promoting women's health and equality. The whole point of the strict-scrutiny test is to "assess the *fit* between the stated governmental objective and the means selected to achieve that objective." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1445 (2014) (emphasis added). Under the jury-rigged approach adopted by the D.C. Circuit, the essential features of the Government's chosen means instead are incorporated *into the definition of the compelling interest itself*, with the foreordained consequence that the regulation then will be perfectly tailored to that rigged definition of the compelling interest. The D.C.

Circuit's approach thus improperly collapses what is supposed to be a demanding and highly constrained multi-step inquiry into a unitary and wholly subjective question for a judge to answer: "Do I think the regulation is very important?"

The D.C. Circuit's approach contravenes settled precedent. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), this Court held that strict scrutiny does not permit the asserted governmental interest to be defined in terms that amount to "a mere restatement of the prohibition itself," as opposed to a "*justification* for it." *Id.* at 538 n.* (emphasis added); *see also id.* at 546-47; *O Centro*, 546 U.S. at 430 (rejecting Government's comparable bootstrap argument that sought to define the relevant compelling interest in terms of "the Controlled Substances Act itself"). The D.C. Circuit's flawed approach to strict scrutiny, if upheld, would threaten all constitutional rights, because "watering it down here would subvert its rigor in the other fields where it is applied." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 888 (1990).

c. Once the D.C. Circuit's improper bootstrap approach is set aside, it is clear that the Government failed to carry its burden under RFRA's "compelling governmental interest" prong.

The Government has a compelling interest in avoiding "substantial health risks" to the public. *See Church of the Lukumi*, 508 U.S. at 545; *see also Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). But the Government failed to present evidence to show that the particular burden it seeks to impose on Petitioners' religious exercise would eliminate a sufficiently significant level of risk to public

health that the Government has a compelling interest in avoiding, especially given that the Government has created extensive exemptions that collectively present *higher* levels of such claimed risk. *O Centro*, 546 U.S. at 433 ("a law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited") (citations and internal quotation marks omitted).

2. The second element of RFRA's strict-scrutiny analysis requires the Government to "demonstrate[] that application of the burden to the person ... is the *least restrictive means* of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2) (emphasis added). This test is "exceptionally demanding," *Hobby Lobby*, 134 S. Ct. at 2780, and the Government has not carried its burden of proof on this issue. Here, there are at least three alternatives that are less restrictive of religious liberty.

a. First, the Government could simply expand its existing exemption from the contraceptive mandate for "religious employers" to cover *all* religious employers. The D.C. Circuit rejected any such alternative on the ground that, "to be effective," a proposed less restrictive alternative must ensure the provision of coverage "to *all* women who want it." Pet. App., No. 14-1505, at 68a (emphasis added). This reasoning fails because the Government already tolerates a vastly underinclusive system in which (due to grandfathering and the existing religious-employer exemption) very large numbers of employees are not guaranteed such coverage.

The D.C. Circuit thus erred in applying a legally flawed zero-tolerance approach under which *any* diminution in the number of persons who are pro-

vided contraceptive coverage is, without more, sufficient to reject a proposed alternative. The only thing "strict" about such scrutiny is the severity it applies to proposed *alternatives*, rather than to the religion-burdening means the Government favors. The D.C. Circuit's approach contravenes this Court's precedent, which has held that the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011) ("some gap in compliance is unavoidable").

b. A second less restrictive alternative would be for the Government to provide or subsidize, on the exchanges established under the Act, a newly established supplemental policy for contraceptive coverage. The D.C. Circuit rejected this alternative, concluding that it would "deter women from accessing contraception." Pet. App., No. 14-1505, at 69a. But the record does not support these highly questionable and speculative assertions, which the Government had the burden to establish with evidence.

c. A third alternative would be for the Government to rely, not on the exchanges, but on a more direct system of assuming the cost of contraceptives. *Hobby Lobby*, 134 S. Ct. at 2780 (describing this as the "most straightforward way"). For example, the Government could simply instruct pharmacies that, if a customer's employer-provided policy excludes contraceptive coverage, the Government will directly reimburse the cost of prescription contraceptives to the pharmacy. From the perspective of the *employee*, the result of such an arrangement is functionally no different than if the prescription contraceptive coverage had been provided by the employer—thereby eliminating the Government's concern about impos-

ing additional logistical steps on the employee. But from the perspective of the *employer*, this approach completely separates the employer and the employer's health plan from the provision of contraceptives in a way that the Government's current so-called "accommodation" does not.

ARGUMENT

Petitioners, who are religious non-profits, demonstrate that their exercise of religion is substantially burdened by the Government's imposition of regulatory requirements that enlist Petitioners and their health plans in the provision of contraceptive coverage to Petitioners' employees. Although the challenged regulations are styled as an alternative "[a]ccommodation[]" of Petitioners' religious objections to the imposition of a *direct* obligation to provide contraceptive coverage to employees, *see*, *e.g.*, 26 C.F.R. § 54.9815-2713A, the so-called accommodation itself compels Petitioners to take actions that violate their religious principles. Specifically, Petitioners show that their exercise of religion is substantially burdened by the Government's commands that, on pain of substantial fines, (1) Petitioners must provide written documentation that triggers an obligation for Petitioners' contracted insurance providers, using Petitioners' plan infrastructure, to provide cost-free contraceptive coverage to Petitioners' employees; and (2) Petitioners must maintain their contract with the provider notwithstanding its provision of such coverage to their employees. *See* Petrs. Br., No. 15-35, at 41-56; Petrs. Br., No. 14-1418, at 27-52. Petitioners brought suit contending that the Government's regulations violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"), but the various courts of appeals below (in conflict with a

recent ruling of the Eighth Circuit) all rejected Petitioners' RFRA claims, concluding that the "accommodation" did not impose a substantial burden on Petitioners' exercise of religion.

In the proceedings below, the Government argued in the alternative that, even if its regulations did substantially burden Petitioners' religious exercise, they did not violate RFRA because the regulations satisfied RFRA's "strict scrutiny" test. Specifically, RFRA provides that "Government may substantially burden a person's exercise of religion only if it *demonstrates* that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (paragraph breaks omitted; emphasis added). RFRA further specifically defines the term "demonstrates" to mean that the Government must "meet[] the burdens [1] of going forward with the evidence and [2] of persuasion." *Id.*, 2000bb-2(3); *see also Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428-30 (2006) (once claimant establishes a substantial burden on its exercise of religion, compelling interest test is an affirmative defense on which the Government bears the burden of production and burden of proof). The D.C. Circuit below was the only court of appeals (other than the Eighth Circuit) to address this alternative argument, and it held that the Government had established that its "accommodation" satisfied both prongs of RFRA's strict-scrutiny standard. Pet. App., No. 14-1505, at 49a-73a.

Amicus curiae agrees with Petitioners that the courts below erred in holding that the Government's regulatory mandates here do not substantially bur-

den Petitioners' exercise of religion. *See* Petrs. Br., No. 15-35, at 41-56; Petrs. Br., No. 14-1418, at 27-52. In this brief, *amicus curiae* will focus on the Government's and the D.C. Circuit's deeply flawed strict-scrutiny analysis, which substantially dilutes the vital protection that RFRA provides to the exercise of religion. The D.C. Circuit applied overly lenient and legally erroneous standards in evaluating *both* prongs of the strict-scrutiny analysis—namely, whether the Government had demonstrated (1) that application of the challenged regulations to Petitioners demonstrably furthered a "compelling governmental interest" and (2) that those regulations were the "least restrictive means" of furthering that interest. 42 U.S.C. § 2000bb-1(b).

I. The D.C. Circuit Applied the Wrong Standards in Holding That the Challenged Regulations Furthered a Compelling Governmental Interest

The first prong of RFRA's strict-scrutiny test, which is contained in section 3(b)(1) of RFRA, requires the Government to "demonstrate[] that application of the burden to the person ... is in furtherance of a compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(1). By its terms, this provision requires the Government: (i) to identify a governmental interest that is "compelling"; and (ii) to show, with evidence, that the "application of the burden to the person" actually "further[s]" that interest. The D.C. Circuit badly misconstrued both of these aspects of the compelling-interest analysis in a way that would eviscerate RFRA's protections.

A. Consistent With Familiar Strict-Scrutiny Principles, RFRA Imposes Stringent Requirements for Determining Whether a Regulation Advances a Compelling Interest

The necessary first step in any strict-scrutiny analysis is to determine whether the Government's asserted interests in burdening a claimant's rights are "compelling." RFRA does not define what constitutes a "compelling governmental interest," but the phrase has an established meaning that imposes demanding requirements, and RFRA confirms that the phrase should be construed in accordance with that settled meaning.

Absent contrary indication, when a statute uses a term of art with a settled meaning, the language will be given that established meaning. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)). Here, far from supplying a contrary indication, RFRA instead confirms that the phrase "compelling governmental interest" is to be given its settled meaning. Section 2(b) of RFRA states that the Act's declared purpose is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1) (italics added to case names). In the referenced cases, the Court expressly relied upon the same familiar compelling-interest requirement that is applied to the protection of fundamental constitutional rights. *Sherbert* explicitly quoted and applied, in the context of religious exercise, the same requirement of a "'compelling state interest'" that was applied to restrictions on freedom of expression in *NAACP v. Button*, 371 U.S. 415, 438 (1963), *see*

Sherbert, 374 U.S. at 403, and *Yoder* relied on the standards enunciated in *Sherbert*, *see* 406 U.S. at 220-21. Thus, RFRA does not rely upon a concept of "compelling" interests that is unique to that statute or unique to the pre-RFRA Free Exercise Clause case law; on the contrary, that term is to be construed in accordance with the established understanding that the term has with respect to laws implicating constitutional rights.

This Court's case law establishes several features that an interest must possess before it can be deemed to be "compelling." First, a "compelling" interest is one that is exceptionally weighty—as the Court explained in *Sherbert*, only "'paramount interests'" that protect against "'the gravest abuses'" may be deemed to be "compelling." 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). *Yoder* likewise defined such interests as being limited to those "of the highest order," 406 U.S. at 215, and this Court has applied that same phrase in describing what constitutes a "compelling" interest under RFRA. *O Centro*, 546 U.S. at 433.

Second, because RFRA's "compelling governmental interest" standard is identical to that applied in the context of other constitutional rights such as the freedom of speech or of the press, *see supra* at 10-11, only those interests that are strong enough to justify *the derogation of constitutional rights* are properly classified as compelling. Thus, for example, an interest that, even in the context of a statute narrowly drawn to further it, would *not* justify infringement of free speech rights cannot be deemed sufficiently "compelling" to justify a substantial burden on religious exercise under RFRA.

Third, "a law cannot be regarded as protecting an

interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citations and internal quotation marks omitted); *O Centro*, 546 U.S. at 433 (applying this principle to RFRA). Thus, "[w]here government restricts only conduct protected by [RFRA] and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Church of the Lukumi*, 508 U.S. at 546-47

Once a properly defined compelling interest has been established, the next step is to make the context-specific determination whether the Government's burdening of religious exercise furthers that compelling interest. Specifically, section 3(b)(1) of RFRA requires the Government to make an affirmative showing that the "application" of the substantial burden to "*the person*" is "in furtherance of" the identified compelling interest. 42 U.S.C. § 2000bb-1(b)(1) (emphasis added). This additional language imposes, in effect, a requirement that the interest invoked be compelling in context. *O Centro*, 546 U.S. at 431. Thus, it is not sufficient to show that the "rule of general applicability" that gives rise to the substantial burden on religion furthers a compelling interest. 42 U.S.C. § 2000bb-1(a). Instead, the inquiry mandated by section 3(b)(1) requires "look[ing] to the marginal interest in enforcing" the rule of general applicability to "'*the particular claimant whose sincere exercise of religion is being substantially burdened.*'" *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *O Centro*, 546 U.S. at 430-31) (emphasis added). Section 3(b)(1) thus requires the Government to demonstrate that "granting specific exemptions to particular religious

claimants" would likely produce the actual "harm" that the Government has a compelling interest in preventing. *O Centro*, 546 U.S. at 431.

This Court's cases describe a variety of ways in which the Government might be able to carry its burden to show that an asserted interest is compelling in the context of specific religious claimants. For example, *Hobby Lobby* noted that the Government "has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race," and that compelling interest is obviously harmed every time that such *intrinsically* injurious racial discrimination occurs in a business workplace. 134 S. Ct. at 2783 (remarking that RFRA thus would not authorize religious claimants to claim an exemption from a generally applicable rule barring racial discrimination). But where the claimed exemption does not involve such always-harmful conduct, the Government may be required to make an affirmative, context-specific showing of actual harm. The Government sought to do so with respect to the *hoasca* use at issue in *O Centro*, but the Court held that, as a factual matter, the "Government had not carried its burden" of proof to show that the *particular* sacramental use of *hoasca* at issue there would present the sorts of physical dangers that the Government asserted a compelling interest in preventing. 546 U.S. at 432. Nor had the Government "offer[ed] evidence that granting the requested religious accommodations would seriously compromise its ability to administer" its program to prevent trafficking in the dangerous hallucinogenic substance in *hoasca*. *Id.* at 435 (explaining that had such a showing been made, it would, in effect, have demonstrated a "compelling interest in uniform application of a particular program").

B. The D.C. Circuit Failed to Apply These Stringent Standards

None of the interests that were asserted by the Government or invoked by the D.C. Circuit satisfies these requirements.

1. The D.C. Circuit Relied on a Bootstrap Approach That Improperly Defined the Compelling Interest as the Regulation Itself

The D.C. Circuit noted below that, in issuing the regulations challenged here, the Government relied on an asserted compelling "interest in supporting women's unhindered, cost-free access to contraceptive services," Pet. App., No. 14-1505, at 52a, and in *Hobby Lobby*, this Court assumed *arguendo* that the Government had such a compelling interest. 134 S. Ct. at 2779 (assuming, without deciding, that the Government had a "compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing"). The D.C. Circuit, however, ultimately rested its analysis on a modified version of this asserted interest. According to that court, the Government has a compelling interest in "provid[ing] *seamless* coverage of contraceptive services for women," which it described as "provid[ing] cost-free contraceptive coverage" in a manner that "remove[s] administrative and logistical obstacles to accessing contraceptive care." Pet. App., No. 14-1505, at 56a (emphasis added). Neither of these formulations of the Government's interest properly defines a "compelling" interest for purposes of strict-scrutiny analysis.

A fundamental flaw in both of these articulations of the Government's asserted compelling interest is that

they rely upon an impermissible bootstrap approach that would eviscerate the entire strict-scrutiny test. Both of these asserted interests are improperly framed in the granular terms of the Government's chosen *means* of accomplishing its ultimate *objectives* of promoting women's health and equality. But the whole point of the strict-scrutiny analysis is to "assess the *fit* between the stated governmental objective and the means selected to achieve that objective." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1445 (2014) (emphasis added). Under the jury-rigged approach urged by the Government in *Hobby Lobby*, however, essential features of the chosen means ("ensuring that all women have access to all FDA-approved contraceptives without cost sharing") are incorporated into the definition of the compelling interest itself, thereby artificially inflating the Government's relative ability to then argue that its rule is closely tailored to its asserted compelling interest. The D.C. Circuit's approach is even worse, because it front-loads into the definition of the compelling interest even *more* of the specific features of the Government's chosen means: in that court's view, the Government's compelling interest is not merely in ensuring access to contraceptives that is "cost-free," but in ensuring that such access is provided through "*seamless* coverage" that eliminates "administrative and logistical obstacles" by combining contraceptive coverage with the remainder of an employee's medical coverage. Pet. App., No. 14-1505, at 56a (emphasis added).

This Court expressly rejected a comparable bootstrap argument in *Church of the Lukumi*, holding that it is flatly inconsistent with strict scrutiny. There, the City of Hialeah sought to justify its substantial restrictions on animal sacrifice, which were

aimed at the Santeria religion, by relying on the same artifice of defining the governmental interest in terms of the specific features of the regulation itself. Thus, the City argued that its restrictions properly served its "governmental interest in prohibiting the slaughter or sacrifice of animals in areas of the city *not zoned for slaughterhouses*." 508 U.S. at 538 n.* (emphasis added). This Court rejected that articulation of the City's asserted interest, precisely because it improperly redefined the City's chosen means as itself being the validating governmental interest: "this asserted governmental interest *is a mere restatement of the prohibition itself*, not a justification for it." *Id.* (emphasis added). Accordingly, in applying strict scrutiny to the City's restrictions, the Court "put aside this asserted interest." *Id.*; *see also id.* at 546-47 (cross-referencing this earlier analysis in explaining why strict scrutiny was not satisfied).

In addition to being contrary to precedent, the D.C. Circuit's approach would also effectively eliminate the least-restrictive-means inquiry. If the key features of the regulation are simply incorporated into the definition of the compelling interest itself, then of course that regulation will be perfectly tailored to that rigged definition of the compelling interest. That approach improperly collapses what is supposed to be a demanding and highly constrained multi-step inquiry into a unitary and wholly subjective question for a judge to answer: "Do I think the regulation is very important?" This subjective, bootstrap approach to strict scrutiny, if upheld, would threaten all constitutional rights, because "watering it down here would subvert its rigor in the other fields where it is applied." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 888 (1990). That type of rigged approach to strict scrutiny has no place in

the "most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and would severely compromise the "very broad protection for religious liberty" established by RFRA, *Hobby Lobby*, 134 S. Ct. at 2760.

Rather, as explained above, the proper approach is (1) to identify a relevant interest that the Government has shown meets the criteria for being regarded as "compelling," and (2) then to determine whether, in the context of the religious claimants at issue, the Government has demonstrated that the harms that it has a compelling interest in avoiding are likely to occur if the claimants are accommodated. *See supra* at 10-13. The more focused inquiry required by this second step—which determines whether the burden on the particular claimants "is in furtherance of a compelling governmental interest," 42 U.S.C. § 2000bb-1(b)(1)—is not a license to rig the definition of the compelling interest in the first step. *Hobby Lobby*, 134 S. Ct. at 2779. Rather, it is an instruction to determine whether the relevant compelling interest at issue, which might be "couched in very broad terms, such as promoting 'public health' and 'gender equality,'" is *actually* implicated, at the margin, in the *specific context* of the burden imposed on the religious claimants. *Id.*; *see also O Centro*, 546 U.S. at 430-31. Thus, in *O Centro*, the Court focused on whether the broadly defined compelling interest in avoiding serious physical harm from "exceptionally dangerous" substances was actually implicated in the specific context of "the circumscribed, sacramental use of *hoasca*" at issue there. 546 U.S. at 432. And in conducting that focused inquiry, the Court specifically *rejected* the Government's effort (comparable to what it does here) to rig the outcome by defining the relevant compelling interest in terms of "the Con-

trolled Substances Act itself." *Id.* at 430 (rejecting the argument that the Government has a compelling interest in the particular "'closed' system" established by the Act, which "prohibits all use of controlled substances except as authorized by the Act itself").

Accordingly, the D.C. Circuit badly erred in applying a bootstrap approach that defined the asserted compelling interest as one of ensuring "seamless coverage" that combines cost-free contraceptive coverage with the employee's employer-provided coverage. Pet. App., No. 14-1505, at 56a.

2. The Other Interests Asserted by the Government Fail to Satisfy RFRA's Standards

Once the D.C. Circuit's improper bootstrap approach is set aside, the remaining question is whether the Government has carried its two-fold burden (1) to identify some other interest that is properly defined as compelling and (2) to show that an accommodation of Petitioners would likely produce the actual harms that the Government's compelling interest aims to prevent. The Government failed to do so.

The Government here also sought to rely on its undoubtedly "legitimate and compelling interest in the health of female employees." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).[2] But the particu-

---

[2] In dissenting from denial of rehearing en banc, Judge Kavanaugh described Justice Kennedy's concurrence more loosely, stating that it recognized a "compelling interest *in facilitating access to contraception* for women employees." Pet. App., No. 14-1505, at 270a (emphasis added). To be precise, the concurrence more carefully (and properly) defined the relevant compelling interest as being the "compelling interest in the

lar religious exercise at issue here is *not* one that would impose any direct harm on the physical health of employees. *Cf. Jacobson v. Massachusetts*, 197 U.S. 11, 25-39 (1905) (upholding mandatory vaccination program); *Jehovah's Witnesses v. King County Hosp. Unit No. 1*, 278 F Supp. 488, 504-05 (W.D. Wash. 1967) (three-judge court) (upholding emergency blood transfusion of minor children over the religious objections of their parents), *aff'd without opinion*, 390 U.S. 598 (1968). As a result, the question here, more precisely, is whether the Government has demonstrated that the burden it seeks to impose on Petitioners' religious exercise would eliminate a sufficiently significant level of *risk* to public health that the Government has a compelling interest in avoiding. *Church of the Lukumi*, 508 U.S. at 545 (government has a compelling interest in avoiding "substantial health risks"). The answer to that question is clearly no.

As noted above, an interest may be ranked as "compelling" only if it is so weighty that it simply cannot be sacrificed, even at the price of fundamental constitutional rights. *See supra* at 11. Consequently, a regulation cannot be regarded as protecting a *compelling* interest "'when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Church of the Lukumi*, 508 U.S. at 547 (citation omitted). The Government's imposition of a substantial burden on Petitioners here plainly fails this test. Any speculative and contingent risk to public health from

---

health of female employees," *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring)—a phrasing that avoids the D.C. Circuit panel's error of incorporating into the definition of the compelling interest itself the specific *means* chosen to achieve that objective.

not commandeering Petitioners into the provision of contraceptive coverage does not implicate a compelling interest when the Government has created extensive exemptions that collectively present *higher* levels of such claimed risk. *See* Petrs. Br., No. 15-35, at 59-68; Petrs. Br., No. 14-1418, at 56-62.

Thus, for example, Congress's decision to exempt "grandfathered" health plans from the statutory obligation to cover "preventive services" cost-free (which, in turn, has been administratively interpreted to include all FDA-approved contraceptive methods) confirms that the mandate on Petitioners does not further a *compelling* interest in avoiding substantial public health risks. *Hobby Lobby*, 134 S. Ct. at 2780 ("Grandfathered plans are required 'to comply with a subset of the Affordable Care Act's health reform provisions' that provide what HHS has described as 'particularly significant protections.' But the contraceptive mandate is expressly excluded from this subset.") (citation omitted). A mandate to provide certain coverage to employees cannot be deemed to further compelling interests in avoiding substantial risks to public health when nearly 34 million private-sector employees and beneficiaries are excluded from that mandate, *see Final Rules for Grandfathered Plans, etc.*, 80 Fed. Reg. 72192, 72218 (Nov. 18, 2015), and for no purpose other than that of "avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, 134 S. Ct. at 2780. Indeed, given that Congress has thus expressly refused to treat the preventive-services mandate as reflecting interests of the highest order, the Government is effectively foreclosed from arguing that its interest in that provision is nonetheless so compelling that it survives the "most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 534, and justifies imposing

a substantial burden on Petitioners' free exercise of religion.

Similarly, the Government's recognition of a complete categorical exemption for religious orders, churches, and integrated auxiliaries of churches, 45 C.F.R. § 147.131(a), belies its contention that the mandate serves a compelling interest. *See* Petrs. Br. in No. 15-35 at 64-68; Petrs. Br. in No. 14-1418 at 57-60. The Government's stated rationale for this exemption is that these categories of employers serve as a proxy for identifying *employees* who would "share the same objection" as their employer to the coverage. *See Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 39870, 39874 (July 2, 2013) (asserting that such an exemption "*does not* undermine the governmental interests") (emphasis added). But the Government has not provided any basis, nor adduced any evidence, to support this presumption or to establish that a comparable exemption that included *Petitioners'* employees would demonstrably create a materially greater level of risk to public health. Absent *evidence* to support its exclusions, the Government has failed to show that its decision to burden Petitioners' religious exercise furthers a compelling interest.

Put simply, the Government has failed to show that exempting Petitioners from the challenged obligations would give rise to a sufficient level of demonstrated risk to public health that the Government has a compelling interest in preventing.[3]

---

[3] For similar reasons, the Government's burdening of Petitioners' religious exercise cannot be salvaged on the theory that it promotes compelling interests in gender equality. The notion that an accommodation of Petitioners would produce an invidious inequality between their male and female employees is

II. The Government's "Accommodation" Is Not the Least Restrictive Means

The second element of RFRA's strict-scrutiny analysis is contained in section 3(b)(2), and it requires that the Government "demonstrate[] that application of the burden to the person ... is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). Unlike the "compelling governmental interest" inquiry, *see supra* at 10, this aspect of RFRA's demanding test "was *not* used in the pre-*Smith* jurisprudence RFRA purported to codify"; that case law did not consistently insist on the same least-restrictive-means analysis that is traditionally applicable to fundamental constitutional rights. *City of Boerne*, 521 U.S. at 535 (emphasis added); *see also Hobby Lobby*, 134 S. Ct. at 2761 n.3 (noting that, in this respect, "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions"); *Smith*, 494 U.S. at 882-84 (noting Court's failure to insist on least-restrictive means in many pre-*Smith* cases). But it is well established that RFRA now requires, as a statutory matter, that substantial burdens on religious exercise be evaluated under the same least-restrictive-means analysis that is applied in other constitutional contexts.

This test is "exceptionally demanding," *Hobby Lobby*, 134 S. Ct. at 2780, and the Government has not carried its burden of proof on this issue. Indeed,

---

likewise belied by the Government's extensive exceptions and in any event is not supported by record evidence concerning the specific circumstances of Petitioners' employees. *O Centro*, 546 U.S. at 432 (reiterating the "more focused inquiry required by RFRA and the compelling interest test").

there are at least three ways in which the Government could further any compelling interest it might have in a manner that is less restrictive of Petitioners' religious liberty than what it has chosen here. *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 945-46 (8th Cir. 2015).

A. Alternative One: Exempting Petitioners From the Contraceptive Mandate

One alternative would be for the Government simply to expand its existing exemption from the contraceptive mandate for "religious employers" to cover *all* religious employers, and not merely the subset of such employers that are religious orders, churches, and integrated church auxiliaries. The practical effect of that exemption would be that employees of religious nonprofits (like employees of companies with grandfathered plans) who nonetheless want a policy *with* contraceptive coverage could still choose to obtain one on the exchanges established under the Affordable Care Act. This alternative would avoid burdening the sincere religious faith of Petitioners, while relying on "an existing, recognized, workable, and already-implemented framework to provide coverage." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring); *see also Sharpe Holdings*, 801 F.3d at 945 (Government could use less restrictive alternative of "'treat[ing] employees whose employers do not provide complete coverage for religious reasons the same as it does employees whose employers provide no coverage'") (quoting Pet. App., No. 14-1505, at 249a (Brown, J., dissenting from denial of rehearing en banc)).

The Government expressly rejected the proposal that the definition of exempted "religious employers"

be expanded, asserting that this would lead to an increased number of employees who would not have access to cost-free contraceptive coverage. *See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services, etc.*, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012); *see also* 78 Fed. Reg. at 39874, 39888. But the Government has already expressly concluded that exempting *some* religious employers "does *not* undermine the governmental interests furthered by the contraceptive coverage requirement," 78 Fed. Reg. at 39874 (emphasis added), and the Government has wholly failed to present any *evidence* to substantiate the view that these Petitioners are in a materially different situation from those religious employers the Government has already exempted. The Government speculates that the latter entities "are more likely than other [religious] employers to employ people of the same faith who share the same objection," *id.*, but it has adduced no evidence at all to support that conjecture. Under the express terms of RFRA, the Government has the "burden[] of going forward with the *evidence*" necessary to "demonstrate[]" that it has adopted the least restrictive means. 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3) (emphasis added); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014) ("To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures" that are less restrictive "would fail to achieve the government's interests, not simply that the chosen route is easier."); *O Centro*, 546 U.S. at 429 (Government bears burden of proof under RFRA, even on plaintiff's motion for preliminary injunction). It has wholly failed to do so.

The D.C. Circuit was therefore wrong in endorsing the Government's view that in order "to be effective,"

a proposed less-restrictive alternative must ensure the provision of coverage "to *all* women who want it." Pet. App., No. 14-1505, at 68a (emphasis added). As explained, the Government already tolerates a system in which (due to the existing exemption and grandfathering) very large numbers of employees are not guaranteed such coverage. *See supra* at 20-21. Moreover, the D.C. Circuit's reasoning reflects a legally flawed zero-tolerance approach under which *any* diminution whatsoever in the absolute number of persons who are provided contraceptive coverage is, without more, sufficient to satisfy the Government's burden "to prove that the proposed alternatives *will not be as effective* as the challenged [regulation]." *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (emphasis added). The only thing "strict" about such scrutiny is the severity it applies to proposed *alternatives*, rather than to the religion-burdening means the Government favors. The least-restrictive-means requirement would be effectively eviscerated if the Government could eliminate less restrictive alternatives simply by showing that they do not *perfectly* accomplish its asserted compelling interests—and that is particularly true where (as here) the Government has *already* accepted far less. As this Court has explained in rejecting a comparable argument that only a perfect alternative may be considered in the least-restrictive-means analysis, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011) (invalidating speech restrictions even though, in their absence, there was evidence of a compliance gap of 20%; "some gap in compliance is unavoidable").

B. Alternative Two: Subsidizing Contraceptive Coverage on the Exchanges

A second less restrictive alternative would be for the Government to provide or subsidize, on the exchanges established under the Act, a newly established supplemental policy for contraceptive coverage. *See* Petrs. Br., No. 15-35, at 74; Petrs. Br., No. 14-1418, at 75-77; *see also* Pet. App., No. 14-1505, at 249a (Brown, J., dissenting from denial of rehearing en banc).

The Government rejected such alternatives, asserting that, "by requiring [employees] to take steps to learn about, and to sign up for, a new health benefit," these proposals would "[i]mpos[e] additional barriers to women receiving the intended coverage (and its attendant benefits)," and therefore "would make that coverage accessible to fewer women." 78 Fed. Reg. at 39888. The D.C. Circuit agreed, concluding that such options would "deter women from accessing contraception" and therefore would not be as efficacious in accomplishing the Government's objectives. Pet. App., No. 14-1505, at 69a. But the record does not support these questionable and speculative assertions, which the Government had the burden to establish with evidence. *See Sharpe Holdings*, 801 F.3d at 945. There is no basis to believe that the separate process of signing up for contraceptive coverage without cost-sharing would be any more complicated than the initial process of signing up for primary coverage. Moreover, the financial incentive of reducing what the D.C. Circuit described as "quite expensive" prescription contraceptive coverage, Pet. App., No. 14-1505, at 60a, casts considerable doubt on the Government's conjecture that these alternatives would be substantially less effective in accomplishing

its objectives. As explained above, the Government cannot take a nothing-less-than-perfection approach in evaluating alternatives, and the Government simply failed to prove that a sufficiently substantial "gap in compliance" would be expected. *Brown*, 131 S. Ct. at 2741 n.9.

Nor can the Government reject these alternatives on the ground that they would require the Government to spend money or to modify or establish an administrative program. This Court expressly rejected such arguments in *Hobby Lobby*, 134 S. Ct. at 2781 (rejecting argument that "'RFRA cannot be used to require creation of entirely new programs'" and holding that RFRA "may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs"). The Government failed to show that the costs or burdens of these alternatives rendered them infeasible. *Bernal v. Fainter*, 467 U.S. 216, 227 (1984) (government must use any less restrictive means that are "practically available"); *see also Hobby Lobby*, 134 S. Ct. at 2781 (noting that "cost may be an important factor in the least-restrictive-means analysis"). Indeed, any such suggestion would strain credulity here, where the Government already reimburses the cost of contraceptive coverage for *self-insured* plans of religious non-profits that object to such coverage. 26 C.F.R. § 54.9815-2713A(b)(3) (if a third-party administrator of an objecting self-insured plan provides contraceptive coverage without cost sharing at its own expense, "the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer").

C. Alternative Three: Government Reimbursement for Contraception

A third alternative would be for the Government to rely, not on the exchanges, but on a more direct system of assuming the cost of contraceptives. *Sharpe Holdings*, 801 F.3d at 945. This Court described such an assumption of contraceptive costs as perhaps the "most straightforward way" of accomplishing the Government's objectives in a manner that is less restrictive. *Hobby Lobby*, 134 S. Ct. at 2780. And from a cost perspective, it would be no more expensive than reliance on subsidized coverage over the exchanges, *see supra* at 26-27.

Such an approach could also provide a way to eliminate the Government's concern that, if employees are required to obtain *separate* contraceptive coverage on the exchanges, some unknown number of employees will fail to sign up. As the D.C. Circuit noted, the core of the Government's interest in providing contraceptive coverage without cost-sharing is that the forms of contraception "that are most effective and fully reversible[] are available *only with a prescription*," and such prescription methods "can be quite expensive." Pet. App., No. 14-1505, at 59a-60a (emphasis added). Thus, even under the regulations at issue here, an employee can actually obtain such prescription contraception *only* by taking the logistical steps of obtaining the necessary prescription and having it filled by a licensed pharmacy, and an employee can obtain cost-free contraception from the pharmacy *only* by providing proof of insurance coverage to that pharmacy. That inescapable logistical step provides a ready means for the Government to pick up the cost of such contraceptive coverage without "[i]mposing even minor added steps

[that] would dissuade women from obtaining contraceptives." Pet. App., No. 14-1505, at 68a. The Government could simply instruct pharmacies that, if a customer's employer-provided policy excludes contraceptive coverage, the Government will directly reimburse the cost.

From the perspective of the *employee*, the result of such an arrangement is functionally no different than if the contraceptive coverage had been provided by the employer. But from the perspective of the *employer*, this approach—in which the Government would directly piggyback onto the involvement of the pharmacist—completely separates the employer and the employer's health plan from the provision of contraceptives in a way that the Government's current so-called "accommodation" does not. Under this alternative, the employer would not have to do *anything* beyond merely objecting to contraceptive coverage, which objection would then entitle it to a complete exclusion from the contraceptive mandate. Since all Petitioners have confirmed to the Court that they do not object "to even having to object," Petrs. Br., No. 15-35, at 45; *see also* Petrs. Br., No. 14-1418, at 43 (indicating that a complete "opt out" from the contraceptive mandate would obviate Petitioners' religious objections), this alternative would eliminate any burden on Petitioners' religious exercise.

There is no basis to conclude that this would not be "a viable alternative," and it is clearly less restrictive than the means that the Government has thus far chosen. *Hobby Lobby*, 134 S. Ct. at 2780. To the extent that implementing such an alternative might require additional legislation, that does not establish that this option is not viable. *See, e.g., Ashcroft v. ACLU*, 542 U.S. at 669-70.

* * *

RFRA requires greater respect than the Government has shown here for the free exercise of religion that is "essential" to preserving the "dignity" of believers and their "striving for a self-definition shaped by their religious precepts." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). The dilution of settled strict-scrutiny standards that the Government advocates here would establish a dangerous precedent that, applied in other contexts, would gravely threaten fundamental constitutional rights. That approach should be rejected as insufficiently protective of the "unalienable right" of "free exercise of religion" that RFRA sought to protect. 42 U.S.C. § 2000bb(a)(1).

CONCLUSION

The Court should reverse the judgments of the courts of appeals.

Respectfully submitted,

DANIEL P COLLINS
Counsel of Record
ZACHARY BRIERS
ANKUR MANDHANIA
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071-1560
(213) 683-9100
daniel.collins@mto.com

Counsel for Amicus Curiae
Ethics and Public Policy Center

January 11, 2016